

SECRETARY OF LABOR,
Complainant,

v.

SUMMIT HABITATS, INC.,
Respondent.

OSHRC DOCKET
NO. 99-0314

APPEARANCES:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado.

Kenneth R. Stettner, Esq., Stettner, Miller and Cohn, Denver, Colorado.

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

After a compliance officer for the Occupational Safety and Health Administration inspected a worksite of Summit Habitats, Inc., that agency issued a citation to the company for the alleged violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The Respondent disagreed with the citation and filed a notice of contest. Thereafter a complaint and answer were filed with this Commission, and a hearing was held in Denver, Colorado

Citation 1, item 1 charged that:

Covers were not capable of supporting, without failure, at least twice the weight of employees, equipment and materials that may be imposed on the cover at any one time.

a) Employees were exposed to the hazard associated with an inadequate floor cover in that on or about December 3, 1998, the builder covered a floor hole with plastic material which was not capable of supporting twice the weight of an employee. On 12/04/98, an employee of a subcontractor fell through the plastic cover.

in violation of the regulation found at 29 C.F.R. §1926.502(i)(2) which provides:

(1) *Covers.* Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements:

(2) All other covers shall be capable of supporting, without failure, at least twice the weight of employees, equipment, and materials that may be imposed on the cover at any one time.

Citation 1, item 2 states:

Citation 1, item 2 Type of Violation: SERIOUS

Covers for floors, roofs, and other walking/working surfaces were not color coded or marked with the word "HOLE" or "COVER" to provide warning of the hazard:

a) On or about 12/03/98, the builder in charge of the worksite failed to label a plastic cover with the word "HOLE" or "COVER" after installing it over a floor hole measuring approximately 2 feet by 3 feet. On or about 12/4/98 an employee of a subcontractor fell through the plastic cover into the basement.

in violation of the regulation at 29 C.F.R. §1926.502(i)(4) reading as follows:

(4) All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

As noted in Respondent's brief, the underlying facts in this case are not in substantial dispute and may be briefly summarized. The Respondent is a home builder in Colorado, and in December 1998, it was engaged in the construction of a custom home. The main floor of the residence contained an opening measuring two feet by three feet. Wall studs around the room were approximately 16 inches apart. In connection with some concrete work in the basement, on December 3, 1998, a plastic substance was stapled over the opening in order to retain heat in the lower level. The following day a subcontractor's employee walked between the studs and stepped

on the plastic. The material was unable to support the worker, and he fell approximately 11-1/2 feet to his death.

At the hearing the compliance officer testified that he recommended that the citation relating to items 1 and 2 be issued because the hole cover was not capable of supporting, without failure, at least twice the weight of an employee as well as equipment and materials that may be on the cover at any one time. Also, the plastic material on the opening was not color coded or marked with the words "HOLE" or "COVER" as a warning of the hazard. The officer pointed out that, under the fall protection regulation relating to residential construction, employees working six feet or more above lower levels must be protected by guardrail systems, safety net systems, or a personal fall arrest system. In his opinion studs did not constitute a sufficient safeguard in that construction workers were known to walk between studs in home building.

Respondent's president did not believe that the plastic material over the opening was a cover, and therefore the regulations cited did not apply. Further, it was the practice in the industry that fixed, framed, permanent wall studs were as acceptable as guardrails. His sentiments were echoed by the company project manager and safety director and a laborer who felt there was no hazard because of the stud protection. A safety director for another home builder also agreed that the opening was sufficiently protected by the studs.

The Respondent asserts that as a matter of law items 1 and 2 of the citation should be vacated because 16 inch on center permanent wall studs are the same as, may be used in lieu of, and are an acceptable alternative to a horizontal guardrail system in residential construction.

This conclusion is at variance with the pocket resource Guide to Safe Work Practices for Home Builders which was developed as part of a cooperative working partnership between the Home Builders Association of Metropolitan Denver and Region VIII OSHA in Denver. On page 41 of the booklet it is provided that open sided floors and holes (that have a fall distance of more than six feet) must be protected by use of guardrails or covers as soon as the hazard is created. Page 42 describes the construction of the guardrails.

To the same effect is the Jobsite Safety Handbook of the National Association of Home Builders and the U.S. Occupational Safety and Health Administration which cautions with respect to Fall Protection, Floor and Wall Openings:

Install guardrails around open floors when the fall distance is 6 feet or more.

Indeed, the Respondent's own Floor Protection Plan provides that all floor openings which will remain open shall be protected by a guardrail and/or cover. It then goes on to describe the construction of a standard guardrail, requiring a top rail, a mid rail, and posts. Covers are to consist of plywood with a "minimum" thickness of 3/4". A drawing depicts the guardrail. There is no mention that studs may be substituted for guardrails.

Both the Commission and Administrative Law Judges have ruled in cases similar to one at bar. In *Donley's v. Secretary of Labor*, 17 BNA OSHC 1227 (No. 95-3653) 1996, a compliance officer observed work being performed from a concrete deck with a 12 foot drop off to the floor below protected only by sawhorses. The ALJ found Donley's had established a valid defense of infeasibility, and guardrails were not required where the employer instituted alternative protective measures. On review by the Commission it disagreed with the ALJ and reversed his decision, pointing out that there was nothing to prevent the company from installing standard guardrails. The Commission decision was affirmed by the U.S. Circuit Court of Appeals for the 6th District.

In *Secretary of Labor v. Ocean Concrete Contractors, Inc.*, 16 BNA OSHC 1451 (No. 91-3449) 1993, an ALJ affirmed a serious violation of 29 C.F.R. §1926.500(b)(i) where an OSHA compliance officer established that floor openings intended to accommodate a stairwell lacked guardrails, creating an eight foot fall hazard.

Also, in *Secretary of Labor v Applied Mechanical Systems*, 15 BNA OSHC 2059 (No. 91-1188) 1992, the citation was based on the fact that a stairwell was open and not guarded by standard guardrails. Numerous witnesses testified that studs were placed at 16 inch intervals. Although the ALJ found that studs were in place, the cited standard required that open sided floors be guarded by standard guardrails which consist of a top rail, intermediate rail, toeboard and posts. The judge concluded that studs did not serve as a substitute for standard guardrails.

In *Secretary of Labor v General Motors Corporation*, 9 BNA OSHC 2081 (No. 80-2273) 1981, the employer was cited for violation of a regulation requiring guarding of a temporary floor opening for failure to install a standard guardrail or assign an employee to provide warning. The evidence established that the opening was unguarded except for temporary barricades consisting of sawhorses and wooden beams which fell apart when jostled. The Commission held that under the

cited standard the employer could elect to protect its employees by either standard railings or by personal attendant. It was not free to choose to reduce the level of protection offered by the standard railings by providing physical barriers of less substance than that provided by standard railings. The violation was affirmed.

Based upon the foregoing discussion, I find that the Respondent was in violation of the regulations recorded in Citation 1, items 1 and 2.

The parties made little, if any, reference to the recommended penalties, and they, therefore, will not be disturbed.

Citation 1, item 3 is copied below:

The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used were not given to employees.

a) The controlling contractor/builder in charge of the project did not instruct its employee(s) in the proper selection of materials to use when covering floor holes. On or about 12/4/98, an employee of a sub-contractor fell through a plastic floor hole covering.

in violation of the regulation found at 29 C.F.R. §1926.503(a)(2)(ii), reading as follows:

(2) The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas:

(ii) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;

The record discloses that the Respondent has a safety program, and all employees receive new hire orientation, including its safety features. In addition, workers attend safety seminars and meet with safety managers and directors. Training included materials in connection with fall protection. A company laborer confirmed that he received safety training, including fall protection and considered himself fully trained.

Thus the Secretary has failed to establish that the Respondent did not instruct its employees in the proper selection of materials to use when covering floor holes. This item of the citation is VACATED.

In conclusion, I find:

1. That the Respondent was in violation of the regulation found at 29 C.F.R. §1926.502(i)(2), and the recommended penalty of \$2,100.00 is AFFIRMED.
2. That the Respondent was in violation of the regulation found at 29 C.F.R. §1926.502(i)(4), and the recommended penalty of \$1,500.00 is AFFIRMED.
3. That the Respondent was not in violation of the regulation found at 29 C.F.R. §1926.503(a)(2)(ii), and item 3 of the citation and the recommended penalty is VACATED.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: February 22, 2000